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Back of(f) the net? FIFA, football, and online streaming

Posted on **June 20, 2014** by **ablack**

As many readers will undoubtedly be aware, the most **expensive** football World Cup to date kicked off recently in Brazil with thirty two teams competing over the course of a month for football's **biggest prize**. Millions of fans are expected to travel around Brazil in pursuit of World Cup **festivities** while **billions** more around the world follow the matches live on TV. In today's digitally connected world many of these fans will tune in online, leading to predictions that this year's World Cup will set new online **records** for the streaming of content.

For such a huge (and financially **lucrative**) event the organisers **FIFA** understandably aim to ensure that fans stick to legal, licensed broadcast avenues. In an effort to achieve this online as well as off FIFA have reportedly sent letters to the owners of prominent streaming websites, **warning** them of the potential consequences of allowing their sites to be used for illegal match streams.

In their letters however FIFA not only ask site owners to do all that they can to remove copyright infringing content but also ask them to put in place pre-emptive measures during the World Cup to make sure that this can be done swiftly. **Allegedly** this includes demands that both sites have staff present during each and every World Cup game to take down material and that they provide FIFA's own enforcement company with the tools to remove any infringing streams directly.

With online streaming presenting an ongoing **problem** for many football rights holders (and with streaming increasingly becoming an important source of revenue for **many** other content **creators**) it is worth exploring whether the copyright enforcement measures demanded by FIFA can in practice be enforced. Can creators and rights holders really demand that intermediaries grant them control over content and commit to take-down times in the minutes?





- These aren't the kinds of streams that FIFA is worried about... Image is in the **public domain** by **mandy**

As a starting point to any such discussion it is important to establish whether online streaming infringes upon copyright at all. Fortunately, the European courts have provided some guidance in this area. Copyright grants its holders a number of **exclusive** rights including, most notably for streaming purposes, the right to restrict **communication to the public** of the protected work. The European courts were invited last year to consider whether online streaming qualified as a 'communication to the public' for these purposes and, in their judgement, came to the conclusion that it **did**. As such streaming a work falls within the exclusive rights of the copyright holder.

In the UK implementation of this decision however there is an important caveat that may undermine its impact. **Section 73** of the UK Copyright, Designs and Patents Act provides a defence against copyright infringement for those who re-transmit by cable the content of a wireless broadcast made by any of the listed 'qualifying services' (a list which includes, in particular, TV broadcasts by the BBC or channel 3 – the two channels who, unfortunately for FIFA, will be broadcasting the 2014 World Cup games **in the UK**). The UK courts in this case found that streaming websites **are** able to take advantage of this section when re-transmitting live TV over the internet, although only to the extent that they are streaming to users in the region to which the original broadcasts were made. As a result, demands that streaming sites remove these channels may face difficulties on this ground.



- It looks like a lot of people will be spending the upcoming month watching these very closely...

Image made available under **CC BY-SA 2.0** by
Glenn Harper

Outside of this particular exception however rights holders generally will have the right to prevent streaming websites making their content available to the public without permission. Nonetheless, while rights holders would be within their rights to demand the removal of their content by site owners what is not clear is whether they can insist upon the level of co-operation and access that are being sought by FIFA in their World Cup letters.

That infringing content appears on streaming websites does not automatically mean that rights holders can require these sites to take any action that they desire to prevent or remove it. A series of previous European decisions, concerning the filtering of copyright infringing content, has established that courts must strike a **balance** when considering the appropriateness of copyright enforcement measures between the intellectual property rights of the copyright holders and the protection of competing fundamental rights for the businesses and individuals affected.



— Image is in the **public domain** by **Jon Sullivan**

In particular the courts have **noted** the need to weigh effective enforcement against the **right** of the intermediary to conduct a business and against the freedom of information of internet users. Demands such as FIFA's must therefore be considered in this context.

In FIFA's favour fall arguments that events such as sporting matches are time-sensitive and, as a result, the value of enforcement diminishes significantly if it can't be carried out before the event is over. If the removal of links is delayed until hours or days later the majority of the loss from this will have already been suffered by the rights holder.

On the other hand, however, the owners of streaming sites could argue that requiring take-down times measured in the minutes (as FIFA's demands would **appear** to require) would create such a burden on their resources that their business would struggle to survive. FIFA's alternative – that site owners allow enforcement companies to take down content directly – is arguably even worse, as it would give a third party substantial control over the content of the site and allow them to govern what information flows through it.

Finally, any balancing act would have to take into account the availability of alternative means of protection. A **large number** of sites have been blocked at an ISP level in the UK and the Premier League has already demonstrated that it is possible to get streaming websites **blocked** as well. It may therefore be hard to convince a court that the burdens of the suggested enforcement actions are necessary while working alternatives exist.

Overall therefore it would appear that, while creators may often have the right to have their unauthorised copyrighted content removed from streaming websites, any demands such as those made by FIFA would be subject to a balancing test by the court: A balancing test that, it could be argued, they would struggle to pass.

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